

UNITED STATES DISTRICT COURT  
FOR THE  
DISTRICT OF VERMONT

Robert Stanton o/b/o	:	
Beverly Stanton	:	
Plaintiff,	:	
	:	
v.	:	Civil No. 1:07-CV-215
	:	
Michael J. Astrue,	:	
Commissioner, Social	:	
Security Administration,	:	
Defendant.	:	

MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION  
(Document 6)

Robert Stanton appearing pro se on behalf of his deceased wife Beverly Stanton appeals the decision of the Commissioner denying social security disability benefits to his wife. He contends that his wife was disabled from employment because no employer would hire her due to the narcotic medications she was taking. The Commissioner has moved to dismiss the appeal because there is no claim that Mrs. Stanton was not able to work due to physical or mental impairments.

DISCUSSION

Plaintiff claims that the ALJ erred by finding that she could perform other jobs in the national economy

despite her impairments. Specifically, the plaintiff claims that she suffered from severe pain as a result of injuries from an auto accident and a hip replacement. However, her objection to the decision of the Commissioner is narrowly based. She contends that due to the narcotic medications she takes for her pain, she is unemployable because she cannot pass a drug test required by any potential employer. The Commissioner responds that Social Security regulations require that disability be based on the physical or mental ability to perform jobs, not on the inability of a claimant to be hired.

It is undisputed that the plaintiff suffers pain from her physical impairments which also cause depression and anxiety. To alleviate this pain and other symptoms she takes daily a number of medications including the narcotic Percocet. She argues that although she has the physical and mental ability to work, she is unemployable because she cannot pass a drug-screening test.

To receive benefits, an applicant must be "disabled" within the meaning of the Social Security Act. See 42 U.S.C. § 423(a). The Act defines a disability as an "inability to engage in any substantial gainful

activity by reason of any medically determinable physical or mental impairment . . . which has lasted or can be expected to last for a continuous period of not less than 12 months." 42 U.S.C. § 423(d)(1)(A). The impairment must be "of such severity that [the claimant] is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy." Id. at § 423(d)(2)(A).

The inability of a claimant to be hired for a job is not a factor in the disability determination. "Considerations derived from local hiring practices, employer preferences for physically superior workers, and the claimant's actual chances of being hired are irrelevant in determining disability, and must be disregarded." Lopez v. Secretary, 512 F.2d 1155, 1157-58 (1<sup>st</sup> Cir. 1975). Provided the claimant is capable of substantial gainful activity, she must be found to be not disabled if she can perform jobs in the national economy regardless of her ability to obtain work. See 20 C.F.R. § 404.1566 (c). Therefore, the plaintiff's objection to the decision of the Commissioner based on her inability

to be hired because of her use of narcotic painkillers cannot be sustained.

The Court does view the complaint liberally since the plaintiff is appearing without the assistance of counsel. In this situation the complaint may reasonably be construed as a claim that the side effects of medication on the plaintiff rendered her unable to perform substantial gainful activity. Nevertheless, even in this context the claim lacks merit.

The ALJ has an obligation to consider the effect of medications on the claimant's ability to work. In evaluating pain symptoms the ALJ must consider the "type, dosage, effectiveness, and side effects of any medication you take or have taken to alleviate your pain or other symptoms." 20 C.F.R. § 404.1529(c)(3)(iv). The ALJ's failure to consider the side effects of medication can result in a remand to make this determination. Burger v. Astrue, No. SACV 06-0965-RC, 2008 WL 576335 at \*5 (C.D. Cal. Feb. 12, 2008). However, in this case the record does not contain information to indicate that the side effects of the plaintiff's medication prevented her from working.

She testified at the administrative hearing that her main complaint was pain in her spine and neck approximately three times a week. R. 336. On a scale of 0-25 with 25 being most severe, her pain was a seven or eight. Id. Despite the effect of her medications, she was able to shop, pay bills, and work around the house. R. 339. Finally, there is no medical evidence in the record that indicates she was unable to work due to the side effects of her medications. Accordingly, the ALJ did not err in failing assess the impact of her medications on her ability to work.

I recommend that the Commissioner's motion to dismiss the complaint be GRANTED.<sup>1</sup>

Dated at Burlington, in the District of Vermont,  
this 14<sup>th</sup> day of April, 2008.

/s/ Jerome J. Niedermeier  
Jerome J. Niedermeier  
United States Magistrate Judge

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<sup>1</sup> Plaintiff seeks to have a "Mr. R. Beckmann" speak on his behalf. However the Local Rules of this Court do not allow a person who is not a member of the Bar of this Court to appear for another. L.R. 83.3(a).

Any party may object to this Report and Recommendation within 10 days after service by filing with the clerk of the court and serving on the magistrate judge and all parties, written objections which shall specifically identify the portions of the proposed findings, recommendations or report to which objection is made and the basis for such objections. Failure to file objections within the specified time waives the right to appellate review of the district court's order. See Local Rules 72.1, 72.3, 73.1; 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b), 6(a) and 6(e).